No. 10-74

In the Supreme Court of the United States

JAVIER RIVERA AQUINO, SECRETARY, PUERTO RICO DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

SUIZA DAIRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Eleventh Amendment prohibits a district court from entering an injunction requiring an official of the Commonwealth of Puerto Rico to adopt regulatory policies that will allow victims of prior unconstitutional actions by that official to recover previously lost funds from private consumers.

TABLE OF CONTENTS

Page

Statement 1
Discussion 5
A. The judgment of the court of appeals is consistent with *Ex parte Young* 6
B. The judgment below does not conflict with any decision of any other court of appeals 12
C. This case would in any event be an inappropriate vehicle for considering the question presented 13
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Blatchford v. *Native Village Of Noatak*, 501 U.S. 775 (1991) 17
Brown v. *Porcher*, 459 U.S. 1150 (1983) 13
Cronen v. *Texas Dep't of Human Servs.*, 977 F.2d 934 (5th Cir. 1992) 13
Duquesne Light Co. v. *Barasch*, 488 U.S. 299 (1989) 12
Edelman v. *Jordan*, 415 U.S. 651 (1974) 11
Ernst v. *Rising*, 427 F.3d 351 (6th Cir. 2005), cert. denied, 547 U.S. 1021 (2006) 13
Esparza v. *Valdez*, 862 F.2d 788 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989) 13
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) .. 10, 12
Florida Ass'n of Rehab. Facilities, Inc. v. *Florida Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208 (11th Cir. 2000) 13
Green v. *Mansour*, 474 U.S. 64 (1985) 11

Cases—Continued: Page

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 14
Milliken v. *Bradley*, 433 U.S. 267 (1977) 12
Paschal v. *Jackson*, 936 F.2d 940 (7th Cir. 1991), cert. denied, 502 U.S. 1081 (1992) 13
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 16
VMI v. *United States*, 508 U.S. 946 (1993) 14
Verizon Md. Inc. v. *Maryland Pub. Serv. Comm'n*, 535 U.S. 635 (2002) 11
Young, Ex Parte, 209 U.S. 123 (1908) 4, 8, 9

Constitution and regulations:

U.S. Const.:
Amend. V, Just Compensation Clause 2
Amend. XI ..... *passim*
Amend. XIV:
Due Process Clause 2
Equal Protection Clause 2
P.R. Laws Ann. tit. 5:
§ 1093 (2005) 1
§ 1096(a) (Supp. 2008) 1
§ 1107(d) (Supp. 2008) 1, 7

Miscellaneous:

Black's Law Dictionary (9th ed. 2009) 8

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondents are the only two fresh milk processors in Puerto Rico. Pet. App. 3a. They are subject to extensive price regulations issued by a regulatory agency within the Puerto Rico Department of Agriculture that is known by its Spanish acronym, ORIL. As relevant here, ORIL has set a minimum price for respondents' purchase of raw milk from dairy farmers, as well as a maximum price for respondents' sale of processed milk to consumers. *Id.* at 5a; see, *e.g.*, 5 P.R. Laws Ann.

tit. 5, §§ 1093 (2005), 1096(a) (Supp. 2008), 1107(d) (Supp. 2008). In addition, respondents are required to purchase all of the dairy farmers' raw milk and to sell any surplus at a regulated price to an entity called Indulac. Pet. App. 6a & n.4. Beginning around 1985, Indulac started to produce UHT (non-refrigerated) milk, which competes directly with respondents' products. *Id.* at 6a, 8a. According to respondents' complaint in this case, although ORIL purportedly set respondents' rate of return at ten percent, respondents in fact lost millions of dollars in fiscal years 2001 through 2003. *Id.* at 9a-10a & n.10.

2. a. In 2004, respondents brought this action in the United States District Court for the District of Puerto Rico for declaratory and injunctive relief, alleging that ORIL's regulatory scheme violated the Just Compensation, Equal Protection, and Due Process Clauses of the Constitution. Pet. App. 11a. Petitioners moved to dismiss on numerous grounds. Among other things, they argued that it would violate the Eleventh Amendment for the district court to adjudicate respondents' claims that petitioners had violated Puerto Rico law. *Id.* at 205a, 207a. The district court agreed, and it dismissed those claims. *Id.* at 213a. Petitioners did not otherwise suggest that the relief respondents sought would violate the Eleventh Amendment, *id.* at 204a-207a, and in all other respects, the district court denied the motions to dismiss, *id.* at 218a.

The district court then held 51 evidentiary hearings regarding respondents' request for an injunction with respect to the regulatory scheme. Pet. App. 70a. The court ultimately issued a preliminary injunction requiring that (1) all processors (respondents and Indulac) pay the same price for raw milk; (2) the Administrator of

ORIL put into effect "rational and scientific regulatory standards that will allow him to determine costs and fair profits return for all the participants in the Puerto Rico regulated milk market"; and (3) the Administrator "adopt a temporary mechanism that will allow the processors to recover the new rate of return they are entitled to (whatever that may be) for the year 2003 (base cost year of the present structure) and up to the day when they begin to recover said rate based on the new regulatory standards and corresponding order." *Id.* at 196a-197a. With respect to the third requirement—the only part of the order that is at issue here—the district court stated that "[t]he Administrator may so act through regulatory accruals, special temporary rates of return or any other available mechanism of his choosing." *Id.* at 197a.

b. Petitioners attempted to comply with the district court's order through proposed regulations known as "Regulations No. 12." Defts.' Joint Informative Mot. Regarding Price Order and Regulation, Dist. Ct. Dkt. No. 938 (July 23, 2008) (Joint Informative Mot.); see Motion to Submit Certified Translation, Dist. Ct. Dkt. No. 1190 (Mar. 23, 2009). Regulations No. 12 provided for a special account, to be kept and managed by ORIL, that was to be used as a depository for the funds necessary to comply with the third part of the preliminary injunction and that would ultimately be disbursed to respondents. See Regulations No. 12, § 8. Those funds were to come from a surcharge of 1.5¢ per quart of milk sold by respondents. Pet. App. 22a n.17.

3. Petitioners appealed the preliminary injunction, and the court of appeals affirmed. Pet. App. 1a-44a. The court held that the third requirement in the district court's order did not violate the Eleventh Amendment.

Id. at 21a-28a. The court of appeals noted that, under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar suits against state officers in their official capacities to compel them to comply with federal law, although such suits may not seek retroactive monetary damages or equitable restitution from state resources. Pet. App. 23a. The court also noted that petitioners provided "no support for their contention that retrospective relief *that does not reach the state treasury* is barred by sovereign immunity." *Id.* at 25a. The court of appeals emphasized that, under the portion of the district court's order challenged here, "the money in question would come directly from consumers of milk in Puerto Rico," and the order "would, in no way, reach the coffers of the Commonwealth." *Id.* at 26a. Petitioners attempted to characterize the preliminary injunction as "ordering the payment of monetary damages in just compensation for a regulatory taking." *Ibid.* The court rejected that argument, observing that "here there has been no award of damages that the state must pay" because "[t]he district court's order does not require ORIL or the Department of Agriculture to provide just compensation, or any monetary award for that matter." *Id.* at 27a.

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 46a.

a. Judge Torruella, concurring in the denial of rehearing en banc, noted that there was "no basis in the record" to conclude that the district court's order makes the Commonwealth liable for payment of monetary relief. Pet. App. 48a. He observed that the regulatory mechanism adopted to comply with the district court's order "carefully shields the Commonwealth's funds and resources from potential liability," rendering the "claim

that the Commonwealth would be required to pay a monetary judgment * * * speculative." *Id.* at 53a. Ultimately, Judge Torruella concluded that "[t]his case simply does not involve a monetary award against the state that burdens the state's treasury, nor does it implicate the Commonwealth's dignitary interests in a manner offensive to the Eleventh Amendment." *Id.* at 54a.

b. Judge Lynch dissented. Pet. App. 54a-68a. In her view, the injunction violated the Eleventh Amendment because it made "the Commonwealth, through one of its administrative agencies, liable for retrospective monetary relief." *Id.* at 60a.

DISCUSSION

Petitioners argue that this Court's review is warranted because the district court issued an interlocutory order granting retrospective monetary relief against the Commonwealth of Puerto Rico. In fact, the district court's order merely requires changes to a program of administrative regulation that would allow respondents to increase the prices at which milk is sold to private parties in the future so that respondents can recover from past losses. That relief is consistent with the Eleventh Amendment, and the decision below does not conflict with any decision of this Court or of any court of appeals. The interlocutory posture of this case also weighs heavily against review. It is unclear whether funds would ultimately pass through a commonwealth account or not, and litigation regarding petitioners' attempts to comply with the preliminary injunction is continuing in the district court. The petition for a writ of certiorari should therefore be denied.

A. The Judgment Of The Court Of Appeals Is Consistent With *Ex Parte Young*

1. The question presented in the petition (Pet. i) is whether a federal court may "order retrospective monetary relief against a sovereign." Petitioners assert that "the district court actually did impose[] monetary liability on the Commonwealth." Pet. Reply Br. 5. That assertion is erroneous, and petitioners' invocation of legal principles and case law applicable to "monetary" remedies is therefore misplaced. Pet. 4, 7, 9-17, 20-21; accord Pet. Reply Br. 1, 4-5.

Petitioners suggest that the court of appeals held that the preliminary injunction did not violate the Eleventh Amendment, "even assuming that the relief at issue was properly characterized as retrospective monetary relief." Pet. 16 (citing Pet. App. 25a-26a). That is incorrect. The court of appeals never assumed that the relief against petitioners could be characterized as monetary for purposes of Eleventh Amendment analysis. Instead, the court assumed that the relief could be characterized as *retrospective*, but it correctly held that the district court's order contains no relief against petitioners that is properly characterized as monetary. Pet. App. 25a-27a.

This suit was brought to challenge rates established under a regulatory program governing transactions between private parties. The district court's order directs the Administrator of ORIL to "adopt a temporary mechanism that will allow the processors to recover the new rate of return they are entitled to." Pet. App. 197a. Consistent with the nature of the regulatory program, the court's order does not mandate that the required recovery for respondents—or any part of it—come from the Commonwealth's funds, nor does it require petitioners

or the Commonwealth to use commonwealth funds if the "temporary mechanism" they choose is unsuccessful. To the contrary, the district court stated that the Administrator could comply with its order "through regulatory accruals, special temporary rates of return or *any other available mechanism of his choosing*," thus allowing the Commonwealth's own official to comply through an adjustment of rates charged by respondents to private parties and to ensure that no commonwealth funds are used. *Ibid.* (emphasis added).

It is uncontested that the Administrator has broad statutory authority to set the price of milk at all stages of its distribution. See 5 P.R. Laws Ann. tit. 5 § 1107(d) (Supp. 2008) ("The Administrator shall fix the maximum, minimum, or only prices for liquid milk * * * in all and any of the distribution channels and levels."). Using that authority, there are at least two obvious ways in which petitioners could have complied with the district court's order—that is, allowed the processors to recover an increased rate of return—without the use of commonwealth funds. First, petitioners could have raised the maximum price that processors were allowed to charge consumers for milk. Second, petitioners could have lowered the minimum price at which processors could purchase milk from dairy farmers. In other words, petitioners could have issued regulations that either allowed respondents to pay less for their raw milk or to charge more for their processed milk (or both). Either of those steps would have increased respondents' net income and thus allowed them to recover an increased rate of return in accord with the district court's order. And neither of these modes of complying with the district court's order would have involved the expenditure or obligation of commonwealth funds. Regardless of how petitioners

chose to comply with the district court's order, the fact that they had the ability to comply without spending or obligating commonwealth funds means that it is inaccurate to refer to the district court's order as "monetary relief." Cf. *Black's Law Dictionary* 920 (9th ed. 2009) (defining "money judgment" as "[a] judgment for damages subject to immediate execution, as distinguished from equitable or injunctive relief").*

Petitioners assert that "the district court has held the Commonwealth liable, and ordered it to set aside funds to cover that liability." Reply Br. 7; see State of Texas, et al., Amicus Br. 18 (suggesting that the court "order[ed] a future payment from a designated account created by the State's regulatory powers"); Pet. App. 64a (Lynch, J., dissenting) (arguing that "[t]he injunction orders the Administrator of ORIL to use the state's regulatory, revenue-raising powers to satisfy plaintiffs' demand for compensation"). But the district court's order reveals that it did not require such an arrangement. *Id.* at 196a-198a. As noted above, the district court did not order that *any* funds be "set aside." Petitioners can comply with the order without any such set aside and independent of any commonwealth funds.

At bottom, there is no meaningful difference between the relief ordered by the district court in this case and that at issue in *Ex parte Young*, 209 U.S. 123 (1908). Like this case, *Ex parte Young* involved state officials

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* Raising the price that processors could charge to consumers could affect the public fisc of Puerto Rico to the extent that the Commonwealth is a purchaser of milk. Petitioner has not suggested that such an indirect financial effect in the marketplace would be relevant for Eleventh Amendment purposes. In any event, decreasing the price that producers could charge the processors would not have even that attenuated potential effect on the Commonwealth as consumer.

who had regulated an industry by setting rates so low as to be unconstitutionally confiscatory. *Id.* at 148-149. This Court concluded that the Eleventh Amendment did not bar a federal court from enjoining the State officials' attempts to enforce the unconstitutionally low rate. See *id.* at 149. Although the ruling resulted in an increase in the flow of money from customers to members of the regulated industry, that did not convert the relief obtained from equitable relief to monetary relief against the commonwealth officials, nor did it mean that the relief violated the Eleventh Amendment. Petitioners identify no basis on which to depart from the result in *Ex parte Young*.

2. Petitioners chose to employ a particular money-handling mechanism that was not mandated by the district court—a surcharge collectible by the Commonwealth and then paid to the processors, rather than an increase in the maximum price that the processors are allowed to charge their customers directly or a decrease in the maximum price that dairy farmers are allowed to charge the processors directly. That choice by petitioners does not alter the sovereign-immunity analysis. This case came to the court of appeals as an appeal from the district court's preliminary injunction. What is at issue is what the district court's order requires, not what steps petitioners have chosen to take in response to that order. The district court could simply have ordered petitioners to increase the maximum allowable price for milk sold by processors (or to decrease the maximum allowable price for milk sold to processors) by an amount that would allow the processors to recover the appropriate rate of return. Instead, respecting Puerto Rico's dignitary interests, the court permitted petitioners to choose whatever method of compliance they

deemed appropriate, so long as it produced the legally required result. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602-603 (1944). As noted above, the court's order does not require the use or obligation of commonwealth funds. Having been accorded discretion to determine how to ensure that respondents obtained the necessary return, petitioners cannot complain that the specific way in which they have exercised that discretion contemplates the payment of a surcharge into a special account under the auspices of ORIL.

Nor is there merit to petitioners' suggestion that the Eleventh Amendment was violated simply because the complaint sought monetary relief. See, *e.g.*, Pet. Reply Br. 5 (asserting that "[s]imply by virtue of the fact that respondents were *seeking* a court order awarding monetary relief against the Commonwealth for past constitutional violations, this case implicates the Commonwealth's sovereign immunity"); *id.* at 3-4, 7. The proper time to challenge the relief sought in a complaint is in a motion to dismiss. Here, although petitioners filed motions to dismiss, they did not allege that the relief sought would violate the Eleventh Amendment to the extent it was based on violations of the United States Constitution. Nor did they appeal the denial of their motions to dismiss. Whether or not those failures amounted to a waiver, petitioners did not squarely challenge the propriety of the relief sought for the alleged constitutional violation, and this Court's review of that issue would therefore be unwarranted. That is particularly so now that the litigation has progressed to the point at which the district court has granted preliminary injunctive relief, and only the propriety of the relief actually granted is directly at issue.

3. Petitioners suggest (Pet. 8-9) that even non-monetary relief is barred by sovereign immunity if it is "retrospective" in nature, but that is incorrect. Petitioners rely on *Green* v. *Mansour*, 474 U.S. 64 (1985), in which this Court held that a district court lacked authority to issue a declaratory judgment that state officials had violated federal law in the past. Petitioners' reliance on that case is misplaced. In *Green*, the Court emphasized both the absence of any "claimed continuing violation of federal law" and the fact that "the issuance of a declaratory judgment" in the circumstances of that case "would have [had] much the same effect as a full-fledged award of damages or restitution by the federal court" because "it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." *Id.* at 73. Neither of those considerations is present here. First, respondents alleged—and the district court found—an ongoing constitutional violation. Pet. App. 171a. Second, as explained above, the order at issue here does not require any payment of money to or by Puerto Rico or its officials. And as this Court has more recently explained, so long as "no past liability of the State, or of any of its [officials], is at issue," and the court's order "does not impose *upon the State* 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials,'" a court may permissibly declare "the *past*, as well as the *future*," illegality of official action, "so that the past financial liability of private parties may be affected." *Verizon Md. Inc.* v. *Maryland Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002) (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974)).

In any event, it is far from clear that the relief at issue in this case is appropriately characterized as retrospective. In setting the prices at which respondents may purchase and sell milk, petitioners enjoy considerable discretion, but they are constitutionally required to permit respondents to earn a just and reasonable rate of return on their invested capital if that is the basis for the fixing of rates under the regulatory program. *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 307-316 (1989); *Hope Natural Gas Co.*, *supra*. Here, the district court found that the years of losses suffered by respondents as a result of petitioners' regulatory scheme had eroded their capital base, making it necessary to take account of those losses in order to determine how milk prices should be regulated in the future. Pet. App. 118a. In other words, at least some consideration of past actions was appropriate in order to provide effective relief from ongoing violations and to set future regulation on a proper course. Such relief is appropriately characterized as prospective, and it is consistent with the Eleventh Amendment. See *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977).

B. The Judgment Below Does Not Conflict With Any Decision Of Any Other Court Of Appeals

According to petitioners (Pet. 10-13), the decision below is contrary to the decisions of five other courts of appeals. But because the district court did not order monetary relief against petitioners or the Commonwealth—and because petitioners can comply with the district court's order without using any funds that were ever under the control of the Commonwealth—petitioners' assertion is incorrect. Each of the decisions cited by petitioners involved actions seeking pay-

ment from a State's funds. Three of those decisions involved state funds in specific segregated accounts, see Pet. 10-13 (citing *Ernst* v. *Rising*, 427 F.3d 351, 361-362 (6th Cir. 2005) (en banc), cert. denied, 547 U.S. 1021 (2006); *Paschal* v. *Jackson*, 936 F.2d 940, 944 (7th Cir. 1991), cert. denied, 502 U.S. 1081 (1992); *Esparza* v. *Valdez*, 862 F.2d 788, 794 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989)), and the other two involved state funds that would, if lost, be reimbursed by the federal government, see Pet. 11-12 (citing *Florida Ass'n of Rehab. Facilities, Inc.* v. *Florida Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1225 (11th Cir. 2000); *Cronen* v. *Texas Dep't of Human Servs.*, 977 F.2d 934, 938 (5th Cir. 1992)). Here, by contrast, petitioners can comply with the district court's order without using any commonwealth funds.

For the same reason, this case does not implicate the question, posed by petitioners, "whether there are some state funds that do not enjoy Eleventh Amendment immunity," Pet. 14 (quoting *Brown* v. *Porcher*, 459 U.S. 1150, 1153 (1983) (White, J., dissenting from the denial of certiorari)), and that question is therefore irrelevant. Likewise, the petition's entire discussion of the importance of the issue presented (Pet. 19-21) is misplaced because it rests on the erroneous premise that the decision below allows the award of retrospective monetary relief against States. The reality that the district court did not order monetary relief here thus weighs heavily against granting the petition.

C. This Case Would In Any Event Be An Inappropriate Vehicle For Considering The Question Presented

1. Even if the question presented, as formulated by petitioners, were actually presented and otherwise mer-

ited this Court's consideration, review would be unwarranted at this time because the case is still in an interlocutory posture. The Court routinely denies certiorari petitions filed by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). That practice ensures that all of a party's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be best served by denying review now and allowing petitioners to reassert all of their claims upon the entry of a final judgment, if they still wish to do so at that time.

Petitioners acknowledge (Pet. Reply Br. 6) that the preliminary injunction at issue in this case is interlocutory, but they suggest that the general rule against interlocutory review does not apply in cases involving sovereign immunity because the benefit of such immunity is lost if the existence of the immunity is not finally determined until after trial. That logic does not apply here because petitioners do not seek review of the denial of a motion to dismiss on sovereign-immunity grounds, nor do they contend that this Court should remand with instructions to dismiss. Instead, the only issue presented by the petition is the propriety of the preliminary injunction issued by the district court. Thus, even if this Court were to grant review and reverse the judgment of the court of appeals, litigation against petitioners would continue. This Court's intervention would therefore not protect Puerto Rico from continued litigation or trial.

2. Review at this stage would be inappropriate for the additional reason that it remains unclear how petitioners will comply with the district court's preliminary injunction. Changes in their method of compliance could alter the appropriate analysis of the Eleventh Amendment issues raised by the petition.

In arguing that review is appropriate now, petitioners refer to "a regulation and accompanying administrative order imposing a 1.5¢ surcharge on every quart of milk sold in Puerto Rico," and they further state that "proceeds from the surcharge *were to have been* held in a segregated account by the Milk Industry Development Fund." Pet. 4 (emphasis added). Petitioners rely heavily on the fact that the funds are required to flow through that segregated account, but the status of that requirement is uncertain. While petitioners cite no specific regulatory provisions, it appears that the regulations to which they refer are Regulations No. 12, which they submitted to the district court in 2008. But when petitioners submitted those regulations to the court, they made clear that they were not final. See Joint Informative Mot. 1-2 (referring to Regulations No. 12 as a "draft" and a "proposed regulation"); see also Vaquería Tres Monjitas Br. in Opp. 10 (suggesting that there is no legal requirement that funds from the surcharge be given to the Commonwealth, only a "proposed * * * regulation" that "has not yet taken effect"). Moreover, we are informed by the parties that the 1.5¢ surcharge contemplated by Regulations No. 12 is currently being collected and maintained in a separate account by respondents, not by any government agency or official.

The status of Regulations No. 12 has been litigated since the preliminary injunction was initially issued, and the parties have disputed whether Regulations No. 12

and related ORIL orders comply with the preliminary injunction. See, *e.g.*, Dist. Ct. Dkt. Nos. 938, 966, 968-970, 973, 978, 981, 982, 985 (party filings addressing Regulations No. 12). The district court has ordered petitioners to modify Regulations No. 12 in various respects, Amended Opinion and Order, Dist. Ct. Dkt. No. 1697 (Sept. 22, 2010), and it has emphasized that "ORIL, at this time, is not near a final decision as to the remedy relating to * * * a fair return of equity." Opinion and Order 4, Dist. Ct. Dkt. No. 1804 (Jan. 3, 2011). In February, petitioners filed a notice of interlocutory appeal from the district court's recent orders. Defts.' Notice of Appeal, Dist. Ct. Dkt. No. 1868 (Feb. 2, 2011). This Court should not review the preliminary injunction while its implementation continues to be the source of dispute and uncertainty being litigated below, and while no funds from the surcharge are actually being paid to a special account maintained by ORIL.

3. Finally, this case is an inappropriate vehicle for considering the sovereign-immunity issues raised in the petition because it arises in the unusual context of Puerto Rico. This Court has expressly reserved judgment on whether Puerto Rico should be treated as a State for Eleventh Amendment purposes. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). Petitioners suggest (Pet. Reply Br. 7) that the Court could "decide this case on the assumption that Puerto Rico is entitled to sovereign immunity," but that is incorrect. Unlike *Puerto Rico Aqueduct & Sewer Authority*, which involved the appealability of a sovereign-immunity claim, this case presents a substantive question of the scope of immunity, and the Court could not reverse the judgment of the court of

appeals without holding, at least implicitly, that Puerto Rico enjoys such immunity.

Whatever inherent immunity a territory such as Puerto Rico might enjoy, it does not necessarily have the same scope as that of States, which entered the Union under a constitutional compact that has been understood to confirm their immunity from suit. Cf. *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 780-782 (1991). Because the applicability of the Eleventh Amendment to Puerto Rico is unsettled and could provide an alternative basis for affirming the judgment below, this case is a particularly poor vehicle for resolving the question presented in the certiorari petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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